In the Massachusetts Supreme Judicial Court—January Term, A. D. 1861.

WHITMORE *vs.* SOUTH BOSTON IRON COMPANY.

1. Where a contract is made by written correspondence solely, it must be treated as a contract in writing, not subject to addition or alteration by proof of the acts, declarations, and intentions of the parties aliunde.
2. But it is competent to show that the parties, subsequent to entering into the same, consented to waive any of its provisions, and to substitute others in their stead.
3. But an additional warranty, not expressed, or implied by its terms, that the article sold is fit for a particular use, cannot be added, either by implication of law or parol proof.
4. Nor can the question whether such warranty is fairly to be inferred, from the application of the terms of the written contract to its subject-matter, or from the attending circumstances, be submitted to the jury; they should be instructed that no such warranty exists in the case.
5. A contract to manufacture "retorts like the one before furnished" imports more than likeness in "size, shape, and exterior form." It has reference to the material and workmanship.
6. Such a contract cannot be controlled by proving a custom in the vicinity of the transaction, that founders shall not be held to warrant their manufacture, unless by express contract; or, in case of apparent defects, and the absence of any express agreement, that they shall have their castings returned in a reasonable time, and the right to replace them by new ones.
7. The rule of damages for not furnishing manufactured articles according to contract is the difference in value between those actually furnished, and such as should have been, unless they were to have been furnished for a particular use.

Contract.—The declaration alleged that the plaintiffs were formerly partners with William T. Hawes, now deceased, and engaged with him in the manufacture of coal oil at East Boston; that, in the early part of 1858, the plaintiffs and Hawes employed the defendants to manufacture for them eighteen iron retorts, to be used at their works in East Boston, for the purpose of extracting oil from coal, for the price of $100 each, and the retorts were manufactured, and the price was paid; that subsequently the retorts were set, and, when applied to use, proved defective and imperfect in their construction, and began to crack and leak, caus

ing not only the loss of the retorts themselves, but a loss of oil, labor and fuel, an interruption of business, and the expense of removing the retorts and replacing them with others. The other facts in the case sufficiently appear by the opinion of the court.

A. A. Ranney, for defendants.

J. G. Abbott and *G. H. Preston*, for plaintiffs.

The opinion of the Court was delivered by

CHAPMAN, J.—The court are of opinion that the rulings of the trial were erroneous in several important particulars.

1. The contract between the parties was made in writing, and is contained in the letter of the defendants to Hawes, and his reply. As soon as the defendants assented to the modifications stated in the reply, the contract was complete. In construing the contract, the Judge ruled that the words, "like the one furnished you in February," did not apply to quality, but only to shape, exterior form, &c. But the Court are of opinion that this is too restricted a construction of these words. They do not apply to weight, because the weight is expressly designated; but they apply to the material; and this should not only be iron, but the same kind of iron that was used in the sample referred to; and they also apply to the quality of the workmanship, which should be like that referred to. The language implies that the iron shall be merchantable of its kind: *Gardiner* vs. *Gray*, 4 Camp. 144; *Shepherd* vs. *Pybus*, 3 Man. & Gr. 868; Chit. Con. 8th Amer. Ed., 450. But it does not imply that the retorts shall be fit for the particular use alleged in the declaration. It is only when a party undertakes to supply an article for a particular use, that he is held to warrant that it shall be fit and proper for that purpose: Chit. Con. 450, and cases there cited; *Brown* vs. *Edgington*, 2 Man. & Gr. 279; *Dutton* vs. *Gerrish*, 9 Cush. 89. When the contract is in writing, an additional warranty, not expressed or implied by its terms, that the article is fit for a particular use, cannot be added either by implication of law or by parol proof: *Chanter* vs. *Hopkins*, 4 M. & W. 399. The general doctrine, that parol evidence is inadmissible to

vary or add to a written contract, would exclude the parol proof; and the ordinary doctrine of construing contracts by adopting the fair import of the language which the parties have used would exclude such warranty by implication of law. Some of the cases cited are also authorities on this point. The question whether there was such warranty should not have been submitted to the jury; but they should have been instructed that the contract of the parties did not contain such warranty.

2. The instructions given to the jury as to the directions given by Messrs. Hawes & Gessner were incorrect. The reply of Hawes to the defendants' proposal directed the making of the retorts "as per memorandum and terms in yours of March 29, and directions given by myself and Henry Gessner." Such reasonable directions as he and Gessner might choose to give would come within this clause, and be binding on the plaintiffs. The plaintiffs allege, as one of their grounds of complaint, that the retorts were cast horizontally, and in green sand. They offered evidence tending to show that the retorts were thus cast; that this method of casting is unusual and improper; that a horizontal casting is much more liable to cold-shuts, blow-holes, shrink-holes, and other defects; and that, in a green sand casting, the liability to blow-holes and shrink-holes is much greater than in a dry sand casting. In reply to this, the defendants offered evidence tending to show that, when applied to by Hawes & Gessner, they told them, and that it was understood mutually, that, if they made them, they should have to cast them horizontally, as they could not get the necessary fixtures to cast them vertically in season; that they began to cast them, and had cast a number horizontally in dry sand, when Hawes & Gessner desired them faster, and were told by the defendants that they could not get them out faster, unless they cast them in green sand, and if so cast they would be more likely to contain blow-holes, shrink-holes, &c., and thereupon they ordered the defendants to cast them in green sand, as they must have them; that seven were cast in green sand, and horizontally—accordingly, it being impossible to cast them vertically in green sand; that all those cast were cast horizontally, and some of them in presence of Hawes and

Gessner, one or both of them, without objection; that they furnished a plan specifying the dimensions and shape and thickness of the retorts, which was followed by the defendants, as they claimed, and that the said Gessner examined the retorts.

If casting the retorts horizontally was an unusual and improper method, such casting would not be a compliance with the contract; and no conversation which was had prior to the making of the contract would be admissible to vary the writing. The casting in green sand was also in violation of the written contract, which provides that the casting shall be in dry sand. But Hawes & Gessner might waive a compliance with their obligation to cast the retorts according to the agreements of the contract; and if, because they were in haste to get the work completed, or for any other reason satisfactory to them, they did waive their rights in this respect, and consent that the retorts should be cast horizontally, and in green sand, the plaintiffs are bound by such waiver and consent. The amount of their knowledge as to the quality of iron, and as to how much better vertical casting is than horizontal casting, or dry sand casting than green sand casting, is immaterial; and the instructions on this subject were erroneous. The only question which was material is, whether they or either of them did, in fact, direct or give consent to the use of the green sand, and the method of casting horizontally, as adopted by the defendants.

3. The evidence offered to show that there was in Boston and its vicinity a custom, that founders should not be held, in the absence of an express agreement, to warrant their castings against any latent defects; also, that there was a custom that they should, in case of apparent defects, and in the absence of any express agreement, be entitled to have the castings returned in a reasonable time, and a right to replace them with new ones, was properly rejected. It would be difficult to state a principle which would reconcile all the numerous decisions that have been made on the subject of local customs or usages. STORY, J., in the *Schooner Recside*, 2 Sumn. 569, says: "I rejoice to find that of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and

customs, and to discontinue any further extension of them." In the present case, the usage cannot be considered as forming a part of the contract.

If the claim of the plaintiffs is found merely in an implied warranty that the retorts should be fit for the particular use alleged, the court are of opinion that the action cannot be maintained. If it is to be further prosecuted on the ground that the contract, as interpreted by the court, has been broken, then the rule of damages, if the action is maintained, will be the difference in value between the retorts actually furnished and such retorts as should have been furnished. This is the rule when goods are not furnished for any particular use. *Bartlett* vs. *Blanchard*, 13 Gray, 429.

Exceptions sustained.

This case is reported in the forthcoming volume of Mr. Allen's Reports. We have given a somewhat more extended head note to the case than that furnished by the reporter, with a view to bring out, more prominently, the important points decided by the Court. And to enable the profession to obtain a more extended and comprehensive knowledge of the present state of the law upon the questions disposed of in the judgment, we have been at the pains to bring together, in a brief note, the leading cases upon the several points determined.

I. In regard to contracts made by way of correspondence, there can be no question they are to be treated as contracts in writing, the same as if the parties had reduced them to writing when both were present. But the precise time at which the contract thus entered into becomes binding upon the parties, has been a great deal discussed. Mr. Justice Chapman here assumes, that "as soon as the defendants assented to the modifications stated in the reply, the contract was completed," and we believe the assumption is well founded. But no question in the law of contracts has been more strenuously debated, both by the Courts, and by elementary writers, than this; and since the discovery of the electric telegraph, there is liable to come in an element of revoking a written offer, which before did not exist. An offer made in absolute terms, and dispatched by post, is considered as irrevocable. If accepted unconditionally, upon its arrival, and immediate notice of such acceptance dispatched by post, in return, before any notice of the recall of the offer reached the person to whom it ws sent, notwithstanding, in the mean time, the party making the offer had changed his mind, and had dispatched by post, a letter of recall, which was received in due course of mail, but not until after the letter of acceptance had been sent. Adams *vs.* Lindsell, 1 B. & Ald. 681; Dunlop *vs.* Higgins, 1 Ho. Lds. Cas. 381; Duncan *vs.* Topham, 8 C. B. 225. This is now the settled rule of the English law.

There are many cases in the books which have attempted to maintain a different rule, but they have not been satisfactory to the profession, or to the common

sense of justice; and have, therefore, not been followed. The case of Cooke *vs.* Oxley, 3 T. R. 653, where it was held, that an offer agreed to be good, if accepted by a given time, was held not binding, has been a good deal discussed, but has never been well received. And the case of McCulloch *vs.* The Eagle Insurance Co., 1 Pick. R. 277, wherein it is held, that the absolute acceptance of an unqualified offer to insure at a rate of premium specified in the offer, is rendered of no binding effect, by the company having dispatched a countermand of their offer before its acceptance, although not received, until afterwards, by the plaintiff, has never been regarded as sound law. Such a view implies, as stated by Mr. Justice Metcalf, in his well known and universally admired Essay upon the Law of Contracts, 20 American Jurist, 18, 19, 20, 21, 22, that no contract ever could become binding, if attempted to be made by way of correspondence.

The infirmity of all this *argument* and *attempt* at reasoning, against the common sense instincts and innate sense of justice of every sound mind, is illustrated by Parker, Ch. J., in McCulloch *vs.* The Eagle Insurance Co., 1 Pick. R. 281, by supposing the letter, on either side, had been recalled before its arrival, *by ay express* outrunning the post, from which the learned Judge concludes it must be very obvious the letter must become of no avail, as it clearly would. And so it has very justly been held, in regard to an offer recalled, before its arrival, by a counter telegram. Bank of the Republic *vs.* Baxter, 31 Vt. R. 101. But the learned Judge does not seem to have here comprehended, that unless the offer is countermanded *before its arrival and acceptance*, it becomes binding as a contract, since by its acceptance, in the manner and time contemplated by its author, the minds of the parties thus meet, and the contract, by its terms, becomes consummated, and any other construction is virtual bad faith. The cases are very numerous which adopt this view, and will be found carefully digested in Perkin's Ed. Chit. on Cont. 8, 9, 10, 11, 12. See also Averill *vs.* Hedge, 12 Conn. R. 424; Redfield on Railw. 78, 98, 99; Mactier *vs.* Frith, 6 Wendell, 116; Hamilton *vs.* Lycoming Ins. Co., 5 Barr, 339; 2 Kent. Comm. 477; Tayler *vs.* Merchants' Ins. Co., 9 How. R. 390, which last case is directly opposed to 1 Pick. R. 277.

II. In regard to the point that articles contracted to be furnished for a particular use, must be suited for that use, it is now perfectly well settled, although for a long time somewhat questioned, that there is an implied warranty to that effect. The authorities are very extensively collated by Bennett, J., in Brown *vs.* Sayles, 27 Vt. R. 227–232; Howard *vs.* Hoey, 23 Wendell, 350; Gallagher *vs.* Waring, 9 Wend. R. 20; Chitty on Cont. 475, and cases cited.

III. The rule of law in regard to the precise effect of the local usages and customs of trade and business, in giving the proper construction to the terms of a written contract, is extremely indefinite. But the view presented by the case to which this note is attached, is, perhaps, liable to some misconstruction. No reason is given why the usage offered to be proved in this case is not properly receivable; and the only case cited, and that with marked approbation, is The Schooner Reeside, 2 Sumner, 569, where Mr. Justice Story approves, what he calls the tendency of modern decisions to restrict the application of the rule within the narrowest limits. One might fairly infer from this, almost, that the Court did not regard this class of evidence with any degree of favor. But the Court clearly did not so intend. There is no other source from which the Courts

derive so much aid in the construction of contracts, since the meaning of all language is made out, mainly, from the implications growing out of the innumerable and wholly undefinable additions, which all minds naturally and necessarily make to the mere words in which a contract or a conversation is expressed. The chief difference between a terse, clear, and forcible style of speaking or writing, and one that is complex, diffuse, and feeble, consists chiefly in so arranging the elepsis, as that all minds cannot fail to supply it readily, and always in the same manner. This can only be done by the aid of a thorough knowledge of the customs and usages of the language, of the place, and of the particular business. In regard to most of these there will be no controversy, since they are known to all, and seem natural and familiar, and right. But when we are offered proof of one which is new and improbable, and which, therefore, seems unreasonable, we instinctively resist it. But this resistance may be more the result of ignorance in the Courts, than of any clearly defined principle. We mean, of course, ignorance in regard to the customs of a particular business. For instance, most inexperienced judges, upon being told by a railway engineer that when he came so near a herd of cattle upon the track, that there was no chance to stop the train before reaching them, or to have them get off the track, he felt it his duty to crowd steam to the utmost capacity of his machinery, would be shocked at the audacity and temerity of such a man, and of such a witness. But this feeling would wholly disappear, upon learning that this was the only hopeful course to preserve the lives of the passengers. A thousand similar illustrations in regard to the course, the usages, and the laws of business, in reference to contracts, might be adduced.

A custom or usage which is unreasonable or in contradiction of the express terms of the written contract, or which is only occasional and not universal in the place and time, will have no effect, is entirely well settled: Burton *vs.* Blin, 23 Vt. R. 151; Clarke *vs.* Roystone, 13 M. & W. 752; Roberts *vs.* Barker, 1 Cr. & M. 808; Boraston *vs.* Green, 16 East, 71. And even where the terms of a written contract, by fair implication, seem to exclude the operation of a usage or custom, it can have no operation: Webb *vs.* Plummer, 2 B. & Ald. 746. And this is nothing more than the fair application of the rule, that written contracts cannot be controlled, or varied by parol evidence. Proof of usage in particular trades has been received to show the secondary meaning of terms, when it is obvious the terms could not have been used in their primary sense, but not otherwise, the Courts feeling bound to give language its natural signification in the construction of contracts, unless that will lead to absurd consequences. This is unquestionably opening a wide field for the discretion of Courts in regard to the effect of such usages, but it is now universally adopted in regard to the construction of wills, and other written instruments, as far as we know: Wigram on Extrinsic Evidence, Prop. iii. p. 42, and cases cited; Chitty on Cont. 104 et seq.; Redfield on Railw. 52, 53, and cases cited, and especially the opinion of Lord Denman, in Humfrey *vs.* Dale, 7 Ellis & Bl. 266. From the opinion of the learned judge here, and from the whole course of modern decisions, it is obvious the tendency is to receive evidence of usage and custom, both local and general, instead of being narrowed, is now admitted with more freedom than the earlier cases would seem to justify.

We admit that this practice, in inexperienced and rash hands, is liable to

become a dangerous instrument, and one quite susceptible of abuse. But that is no reason why it should be discountenanced. There is no good thing which is not liable to abuse, and often the more liable, in proportion to its value. But this should not induce us to relinquish it, but rather to study more carefully to guard against its abuse. The most unfortunate thing in regard to this, as in regard to all others, is, that men's confidence in themselves is quite liable to be in the inverse ratio of the confidence of others in them, so that precisely these men who require most sedulously to be hedged in against committing high-handed wrong and abuse, are those whom it is the most difficult to restrain. Thus it often happens that the class of men with whom an extended discretion is least safely to be trusted, are the very men most ambitious of assuming such an irresponsible discretion; and on the other hand, those most capable of its exercise are the least ready to assume it. So in regard to judicial discretion in the application of customary law, those judges who feel the most entitled to confidence commonly deserve the least. And while it is said *boni judicis ampliare jurisdictionem*, the fact of seeking to enlarge one's jurisdiction is more common with bad judges than with good ones. But the one does it to secure justice, and the other to gratify his own conceit, and sometimes to disappoint the expectations of others; for personal conceit and vindictiveness commonly go together.

But with all this ground of argument so justly open against the introduction of usage or custom in the exposition of written contracts, and all contracts, the rule is nevertheless a wise one, and one which will be likely to widen as time advances. The great wisdom and the great difficulty will always be found in defining the exceptions, which will be liable to be sometimes unjustly multiplied to suit the tastes of particular men, and as often unjustly narrowed to meet the supposed exigency of particular cases. But this results from the baseness and the infirmities of human nature, and which no human forecast can prevent or effectually restrain. I. F. R.

In the Superior Court of the City of New York.

SAMUEL CARPENTER *vs.* THE SIXTH AVENUE RAILROAD COMPANY.[1]

1. A collusive settlement of an action, by the parties, to deprive an attorney of his costs, made after a notice from the attorney, of his claim, to the defendant, will not be allowed to prejudice the attorney's right to enforce payment of his taxable costs.
2. His claim for taxable costs will be protected against a collusive settlement in an action upon a *tort* merely *personal*, as well as in an action upon contract; and as well against a settlement made before trial as after judgment.
3. But an attorney, by an agreement between him and his client, that, besides taxable costs, he shall receive as a compensation for his services a sum equal to

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[1] We are indebted for this case, together with the reporter's note and statement of facts, to Chief Justice Bosworth, for which he will please accept our thanks.—*Eds. Am. Law Register.*